United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

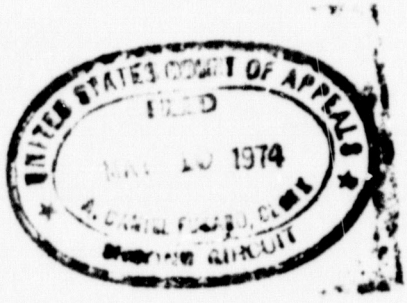
74-1251

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REA EXPRESS, INC. Petitioner, v. CIVIL AERONAUTICS BOARD Respondent, and AIR EXPRESS INTERNATIONAL CORPORATION Intervenor	Docket No. 74-1251

BRIEF OF PETITIONER REA EXPRESS, INC.



Peter G. Wolfe
REA Express, Inc.
219 East 42nd Street
New York, New York 10017

May 13, 1974

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

REA EXPRESS, INC.	
Petitioner,	
v.	
CIVIL AERONAUTICS BOARD	Docket No.
Respondent,	74-1251
and	
AIR EXPRESS INTERNATIONAL CORPORATION	
Intervenor	

BRIEF OF PETITIONER REA EXPRESS, INC.

STATEMENT OF ISSUES

1. May the Civil Aeronautics Board refuse to investigate a complaint of name confusion on grounds that it has no reason to believe that there has been actual substantial public confusion unless this finding is supported by substantial evidence?

2. Was the finding of the Civil Aeronautics Board that it had no reason to believe that there has been

actual substantial public confusion supported by substantial evidence?

STATEMENT OF THE CASE

Petitioner REA Express, Inc. (REA) is an indirect air carrier which renders Air Express service under an Agreement between itself and twenty-eight airlines. (1(a)) REA originated the first Air Express shipment in 1910 and the first Air Express regular service in September, 1927, seventeen years before publication of the first air freight tariff. REA has spent substantial sums in advertising the term "Air Express." Air Express is the only service which (1) serves all airport cities and almost all other communities in the nation as a single carrier, with integrated operation, and does so under a single through waybill with single carrier responsibility, (2) routinely provides priority handling on the ground, (3) carries virtually all commodities tendered to it, and (4) receives priority on aircraft. In the Air Freight Forwarder Case, 9 C.A.B. 473 (1948), the Civil Aeronautics Board found (488) that Air Express service is an "expedited dependable service by air which has come to be relied on by a large proportion of the public [and is] a separate and distinct expedited service differing in many essential details from air freight service." (2(a))

On October 4, 1972, REA filed complaints with the Civil Aeronautics Board against AEIC and DAX on the ground that their use of the words "Air Express" in their names was inherently likely to confuse Air Express customers of REA and constitutes an unfair method of competition within the meaning of Section 411 of the Federal Aviation Act of 1958, as amended (1(a)-8(a)). It had not previously filed complaints because until August, 1969, REA was owned by the railroads, who prevented it from doing so (4(a)).

On June 8, 1973, Richard J. O'Melia, Director, Bureau of Enforcement, Civil Aeronautics Board issued a determination that it would not be in the public interest to institute an enforcement proceeding upon the allegations set forth in the complaint. Mr. O'Melia found that the names were not inherently likely to cause substantial confusion, principally because the Board had never found such names confusing in the past, and REA had not presented actual instances of confusion (23(a)-31(a)).

REA then filed a motion to review Mr. O'Melia's determination. With its motion, REA moved to amend its complaint to add the following language:

> "The use of the words 'Air Express' has resulted in actual confusion on the part of the shipping public between the services of REA and the services of the respondent." (40(a))

REA also presented an affidavit reporting on information

received by REA employees around the country. This affidavit, limited to instances of confusion reported on during a one week period, included information from 22 U. S. cities. It cited 22 specific instances of shippers who confused REA services with those of AEIC or DAX. Most of these shippers were identified by name and address, and many by the waybill numbers of their shipments. In addition, the affidavit stated that (1) a survey of airline customer service personnel in California showed that 60% of them were confused; (2) the New Jersey Telephone Company's internal listings set forth AEIC as a subordinate listing under REA Express; and (3) an REA manager who was previously a manager for DAX stated that DAX got many telephone calls from shippers who asked for Air Express, DAX personnel answered "Yes, this is Domestic Air Express, may we help you," and in 75% of the cases they got the shippers' business for DAX. Finally, the affidavit also reported the fact that many other telephone calls were received from confused shippers, REA often received mail intended for DAX and AEIC, etc. (42(a)-48(a))

REA also offered to submit proof at a hearing that there have been many actual instances of shipper confusion, by testimony of its own employees, by testimony of shippers, and by means of a survey to be agreed upon by all interested parties (37(a)-38(a)).

On August 28, 1973, the Civil Aeronautics Board issued Order 73-8-134, affirming the determination of Mr. O'Melia without any investigation whatsoever. The Board found that the similarity of names in themselves would not result in substantial public confusion, there have been no previous complaints against the use of the name "Air Express," and REA's affidavit failed to convince it because "the affidavit is general in nature, setting forth, for the most part, broad conclusions .... [and] is singularly lacking in specifics." (66(a)) A subsequent Petition for Reconsideration filed by REA was also denied by Order 73-12-102, dated December 26, 1973.

ARGUMENT

I AN INVESTIGATION MAY NOT BE REFUSED ON THE GROUND THAT COMPLAINANT FAILED TO PROVE CERTAIN FACTS UNLESS SUBSTANTIAL EVIDENCE SUPPORTS SUCH A FINDING

Section 411 of the Federal Aviation Act (49 U.S.C. §1381) provides as follows:

> "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

The Board's determination whether to institute an enforcement action is subject to judicial review. In American Airlines v. North American Airlines, 351 U.S. 79 at 83, 85 (1956), the U. S. Supreme Court stated that the question of

> "whether or not the facts, on complaint or as developed, show the public interest to be sufficiently 'specific and substantial' to authorize a proceeding ... is subject to judicial review .... We decide ... whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination."

The American Airlines Case involved a proceeding in which the Board found evidence of confusion, and in which it further found that public confusion between air carriers operating between the same cities is adverse to the public interest. On the other hand, in the instant case the Board did not find that public confusion would be in the public interest -- it made no basic findings of public interest at all, aside from its ultimate finding. Instead, the Board based its entire order on a factual finding - that REA had made no showing that there were reasonable grounds for belief that substantial confusion existed. In such a case, the Court should determine whether the record supports the fact that complainant has made a prima facie case and then the burden should be on the Board to justify its dismissal.

> "Particularly should there be a showing when the Board chooses to dismiss a complaint for lack of substantive merit. Otherwise the Board could create precedent by fiat and avoid judicial review of the substantiality of the supporting evidence." Trailways of New England, Inc. v. C.A.B., 412 F. 2d 926, 932 (1st Cir. 1969).

The Board's determination that reasonable grounds to believe that substantial public confusion exists is not supported by any evidence of record. Thus there remains no evidentiary basis for its decision. A finding of fact without substantial evidentiary support is an arbitrary and capricious abuse of discretion outside the administrative discretion conferred by statute. United States v. Shaughnessy, 234 F. 2d 715 (2d Cir. 1955). All findings of fact must be supported by substantial evidence, even if the order on review is an order issued without hearing. Nebraska Department of Aeronautics v. C.A.B., 298 F. 2d 287 (8th Cir. 1962). Further, an administrative determination that there is failure of proof would be arbitrary and capricious if not supported by substantial evidence. Irvin v. Hobby, 131 F. Supp. 851 (N.D. Iowa 1933). In this case there is no evidence whatsoever to support the Board's conclusion.

Thus, unless the findings of the Board that REA failed to show reasonable grounds for belief that there was

substantial public confusion are supported by substantial evidence, the Board's order must be reversed as arbitrary and capricious.

II THE FINDINGS OF THE CIVIL AERONAUTICS BOARD WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The basic substantial evidence test is that set forth in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1950), where the Supreme Court stated (at 490):

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

A case in which the substantial evidence rule was interpreted in a somewhat similar context to the instant case was Cream Wipt Food Prod. Co. v. Federal Security Administrator, 187 F. 2d 789 (3d Cir. 1951). In that case, the Administrator ruled that salad dressing cannot contain cream and milk because it "would provide a basis for labeling and advertising claims as to the virtues of these ingredients in the abstract." The sole evidence in support of this finding was the testimony of a government chemist who had no expertise in customer reactions to salad dressings. The Court ruled that the finding was not supported by substantial evidence

because the product had been marketed for many years, and evidence as to actual customer desires was available and was "reasonably anticipated in the circumstances of the case...." (187 F. 2d at 791)

What is the record herein? The only support in the record cited by the Board supporting the Board's finding was that REA, AEIC and DAX had operated for many years, and the Board had not received complaints of name confusion previously. (65(a)-66(a)) There was no basis in the record to support this finding and REA was not permitted to rebut it by cross-examination, or determine whether the Board had indeed retained records of all complaints filed which REA, AEIC and DAX were operating. Beyond that, the Board relied on assumptions such as that "the users of air service are considerably more sophisticated than they were 20 years ago." (67(a)) Such a priori assumptions of shipper reactions to advertising were exactly the type of assumptions struck down in the Cream Wipt case, which, of course held that such abstract conclusions could not be supported merely by the speculations of the agency.

On the other hand, REA's evidence, which is discussed in detail in the Statement of the Case, shows that there has been substantial confusion. Though the Board found that REA's affidavit was singularly lacking in specifics," it actually was full of specifics, as anyone

reading the affidavit could easily ascertain. It is, in fact, an impressive indication of the extent of confusion that exists among the shipping public that such detailed information could be produced within the space of a week. One can only conclude that a more extensive investigation of shipper confusions would result in widespread evidence of confusion. REA offered to undertake such an investigation, if the Board would grant it a hearing or remand the case to the Bureau of Enforcement, but the Board could only find that it was not convinced of the likelihood of substantial confusion.

If the affidavit of REA was indeed insufficient, there was no statement from the Board as to what type of evidence would have been sufficient. It is an axiom of administrative law that agency findings must be sufficiently detailed to enable a reviewing court to understand an agency's decision. As Mr. Justice Cardozo said in U. S. v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510-511 (1935):

> "the difficulty is that it [the Interstate Commerce Commission] has not said so with the simplicity and clearness through which a halting impression becomes a reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences.... We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Such a requirement is not limited to findings of fact. It

also applies to findings of credibility or substantiality of evidence. In Local 138, International Union of Operating Engineers v. NLRB, 321 F. 2d 130, 138 (2d Cir. 1963), Judge Friendly of this Court said:

> "I am disturbed by what seems a rather frequent practice of some of the Board's examiners, instanced here, of endeavoring to support findings by applying a 'credible' rubber stamp to one witness and a 'not credible' one to another, with no explanation that will assist the Board or a reviewing court in ascertaining what led to a use of the particular stamp. The respect which §10(e) and (f) of the National Labor Relations Act commands the court to give to the Board's findings of fact carries a correlative duty to explication for the Board and its examiners."

Where, as here, the findings at issue is one phrased in terms of whether REA made "a threshold showing of reasonable grounds for believeing that a state of facts" exists, the Board must explain what standards it has used and will use in determining what showing would be sufficient. If no such standard is set, a Court cannot determine whether the Board's finding that REA has failed to meet that standard is supported by substantial evidence, and is left with untrammeled discretion on the part of the Board. This was not the intent of Congress when it specified that Board findings will be conclusive "if supported by substantial evidence" (49 U.S.C. § 1486(3)). The Board has failed to set such a standard, and its decision is therefore invalid.

CONCLUSION

The Board's order is based on findings not supported by substantial evidence and insufficiently articulated and should therefore be reversed and remanded for investigation.

Respectfully submitted,

Peter G. Wolfe
Attorney for
REA Express, Inc.
219 East 42nd Street
New York, New York 10017

0

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC. Petitioner, v. CIVIL AERONAUTICS BOARD Respondent, and AIR EXPRESS INTERNATIONAL CORPORATION Intervenor	Docket No. 74-1251

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused two copies of the Brief of Petitioner REA Express, Inc. and one copy of the Joint Appendix to be served upon Glen M. Bendixsen, Associate General Counsel, Civil Aeronautics Board, Washington, D. C. 20428, and Henry J. Silberberg, Stroock, Stroock & Lavan, 61 Broadway, New York, New York 10006 by first-class mail.

Peter G. Wolfe

Peter G. Wolfe

May 10, 1974